STATE OF MICHIGAN

COURT OF APPEALS

DAVID TOOLANEN and CAROLINE TOOLANEN, Plaintiffs-Appellants, v LEAR CORPORATION, Defendant-Appellee.	UNPUBLISHED January 25, 2007 No. 272056 Roscommon Circuit Court LC No. 06-725819-CK

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Plaintiffs[1] appeal as of right from the order granting summary disposition for defendant under MCR 2.116(C)(7). We affirm.

Plaintiff was an employee of ITT Automotive when the company was purchased by defendant Lear Corporation. After the purchase, defendant had its employees sign an employment application. This employment application contained the following provision:

> I FURTHER AGREE NOT TO BRING ANY ACTION OR SUIT RELATING DIRECTLY OR INDIRECTLY TO EMPLOYMENT WITH LEAR CORPORATION, OR THE TERMINATION OF SUCH EMPLOYMENT, MORE THAN ONE (1) YEAR AFTER THE DATE OF TERMINATION OF SUCH EMPLOYMENT AND I WAIVE ANY STATUTES OF LIMITATION TO THE CONTRARY.

Plaintiff signed the application on October 16, 1997. In the summer of 2003, plaintiff was advised that he would be released from his employment due to lack of work. At that time, plaintiff requested and received a copy of his employment file. Plaintiff was not released at that

[1] Plaintiffs are husband and wife. Plaintiff Caroline Toolanen's claims are strictly derivative of her husband's claims. Consequently, the singular term "plaintiff" refers to David Toolanen only. Because we conclude that dismissal of plaintiff's claim was proper, the dismissal of Caroline's claim was also proper.

time. On December 22, 2004, plaintiff was discharged from defendant's employ. After his termination, defendant filed a written request, under the Bullard-Plawecki Employee Right to Know Act, MCL 423.501 *et seq*., to receive a copy of his personnel file. On January 20, 2005, plaintiff received a copy of his file, but alleged that a copy of his employment application, containing the notice of the shortened period of limitations for filing claims, was not contained within his personnel file. After his discharge, plaintiff retained counsel who sent a letter to defendant dated March 14, 2005. This letter, written by plaintiff's counsel, advised defendant that he was authorized to file suit alleging a violation of the Elliot-Larsen Civil Rights Act, MCL 37.2101 *et seq*, unless the parties resolved the matter by April 1, 2005.

On January 31, 2006, plaintiff filed a complaint alleging that his discharge was a result of age discrimination by defendant. Defendant moved for summary disposition, alleging that the statute of limitations had expired based on the one-year provision contained in the employment application. Plaintiff alleged that there was a split of authority regarding the application of contractual periods of limitation that reduced the statutory period of limitations. It was also asserted that the case law cited by defendant was distinguishable. However, plaintiff alleged that the contractual period of limitations should not been enforced against him when defendant failed to provide him with copies of his employment application when he requested copies of his personnel file.

The trial court denied the motion for summary disposition, concluding that the contrary positions regarding the furnishing of the employment application required him to hold an evidentiary hearing. The parties did not object to the trial court's proposed course of action. At the evidentiary hearing, plaintiff and his wife testified that they went through the personnel file and did not see the employment application. However, plaintiff testified that he did fill out and sign the employment application. Plaintiff testified that he gave the copy of his personnel file to his attorney.[2] Defendant's representative testified that 181 pages were presented to plaintiff, and the employment application could be found at page twenty-two of the materials submitted to plaintiff. The trial court reviewed the personnel file and held that the testimony presented by defendant was credible,[3] upheld the one-year period of limitation contained in the employment application, and granted defendant's motion for summary disposition.

Plaintiff first alleges that defendant had an obligation to provide plaintiff with a copy of his employment application. We hold that this issue is without merit. Although appellate review of summary disposition decisions is de novo, *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004), the trial court conducted an evidentiary hearing regarding the receipt of a copy of the employment application. The clear error standard presents the appropriate scope of

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[2] Plaintiff testified that he did not receive a copy of his employment application in his earlier request for his personnel file when he was advised that he would be released because of lack of work.

[3] The trial court did not conclude that the testimony presented by plaintiffs was incredible. Rather, it was opined that they probably did not see the application in the file.

review when the parties challenge the trial court's factual findings. See *Coblentz v City of Novi*, 475 Mich 558, 568; 719 NW2d 73 (2006).

We note that plaintiff's complaint raises a claim based on age discrimination. Plaintiff did not raise any claim based on the employee right to know act and did not seek to amend the complaint to allege such a violation. Following the testimony from four witnesses at the evidentiary hearing, the trial court expressly held that defendant fulfilled its obligation to provide a copy of the employment application. We cannot conclude that this finding was clearly erroneous. *Coblentz, supra*. Moreover, plaintiff acknowledged at the evidentiary hearing that he was presented with the employment application and signed the application. Accordingly, this challenge is without merit.

Plaintiff next alleges that the production of plaintiff's job application presented a question of fact for the trier of fact, and the trial court erred in holding an evidentiary hearing. We disagree. In the lower court record, plaintiff never objected to the trial court's determination that an evidentiary hearing would be held. However, after a ruling adverse to plaintiff, it is now asserted that the procedural course of action taken was erroneous. Plaintiff may not harbor error as an appellate parachute. *In re Gazella*, 264 Mich App 668, 679; 692 NW2d 708 (2005). That is, counsel may not assent to a course of action in the lower court and assign error to the action on appeal. *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002).

In any event, we note that plaintiff did not raise a claim in the complaint challenging the Bullard-Plawecki Employee Right to Know Act. Rather, plaintiff raised a claim based on age discrimination. At the evidentiary hearing, plaintiff acknowledged that he signed the employment application. The fact that he may or may not have received a copy of the agreement to which he was a party is not relevant to the statute of limitations claim for age discrimination. Accordingly, this challenge is without merit.

Lastly, plaintiff acknowledges that an unambiguous contractual provision shortening the period of limitations must be enforced as written. *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005); *Clark v DaimlerChrysler Corp*, 268 Mich 138, 143; 706 NW2d 471 (2005). Plaintiff alleges that an exception to the general rule applies because the failure to provide a copy of the employment application to plaintiff was unconscionable. However, plaintiff failed to meet the procedural and substantive criteria to establish unconscionability. *Clark, supra* at 143-144. Moreover, plaintiff acknowledged the receipt of the form and his signature on the form. One who signs a contract is presumed to have read it, and when enforcement is sought, may not allege that he did not read it or that it was different in its terms. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 59; 664 NW2d 776 (2003). Therefore, the key issue is not whether plaintiff received a copy of the application, but his acknowledgement of its receipt and signature on the document. Accordingly, plaintiff cannot challenge the contract's terms regardless of the existence and presentation of a copy to him.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Deborah A. Servitto